No. 78-308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

MOBAY CHEMICAL CORPORATION, *Appellant,*

v.

DOUGLAS COSTLE, Administrator, United States Environmental Protection Agency, *Appellee.*

On Appeal from the United States District Court for the Western District of Missouri

---

JURISDICTIONAL STATEMENT

ERWIN N. GRISWOLD
Counsel for the Appellant

Of Counsel:

LINDA K. SMITH
CAROL ANN MOONEY
JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

JOSEPH E. STEVENS, JR.
C. DAVID BARRIER
LATHROP, KOONTZ, RIGHTER, CLAGETT, PARKER & NORQUIST
1500 TenMain Center
Kansas City, Missouri 64105

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

MOBAY CHEMICAL CORPORATION, *Appellant,*

v.

DOUGLAS COSTLE, Administrator, United States Environmental Protection Agency, *Appellee.*

On Appeal from the United States District Court for the Western District of Missouri

---

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, *infra,* pp. 1a-22a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on March 28, 1978. (App. B, *infra,* p. 23a.) The notice of appeal was filed May 26, 1978. (App. C, *infra,* p. 24a.) An order of Mr. Justice Blackmun extending the time for docketing this appeal to August

24, 1978, was entered July 10, 1978. (App. D, *infra*, p. 25a.)

The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253, 2282, as they were in effect when the suit was brought.[1]

QUESTION PRESENTED

Whether Section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended in 1975, providing for limitations on and compensation for the Environmental Protection Agency's use of research and test data submitted confidentially by an applicant to support the registration of a pesticide, but restricting that provision to data which were submitted "on or after January 1, 1970," violates the due process and just compensation clauses of the Fifth Amendment in that (a) such limitation effects a governmental taking of private property in the form of data submitted confidentially prior to 1970, (b) the taking is for private purposes, and (c) the taking is without just compensation.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

---

[1] The amended petition seeking an injunction against the enforcement of the statute was filed April 23, 1976. The repeal of 28 U.S.C. § 2282 by the Act of August 12, 1976, P.L. 94-381, 90 Stat. 1119, is not applicable "to any action commenced on or before the date of enactment."

STATUTE INVOLVED

Section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended by the Act of November 28, 1975, P.L. 94-140, 89 Stat. 751, 755 (7 U.S.C. § 136a(c)), provides, in pertinent part:

> (1) Each applicant for registration of a pesticide shall file with the Administrator a statement which includes—
>
> * * * * * * * *
>
> (D) if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted on or after January 1, 1970, in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b). This provision with regard to compensation for producing the test data to be relied upon shall apply with respect to all applications for registration or reregistration submitted on or after October 21, 1972. If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If either party does not agree with said determination, he may, within thirty days, take an appeal to the Federal district court for the district in which he resides with respect to either the amount of payment or the terms of payment, or both. Registration shall not be delayed pending the determination of reasonable compensation between the applicants, by the Administrator or by the court.

STATEMENT

A. Statutory and Regulatory Background

The constitutional issue in this case is clear and compact:

> May private research and test data developed by a party at great expense, and submitted in confidence to the government to support the party's application, be used by the government, without compensation, for the benefit of another party who made no contribution to the development of the data?

In order to understand how this issue arises, it is necessary to set out first the history and development of the Federal Insecticide, Fungicide and Rodenticide Act, and some of the administrative actions taken under that Act.

The Federal Insecticide, Fungicide and Rodenticide Act (customarily known as FIFRA) was originally enacted in 1947 to require the registration of all pesticides shipped in interstate commerce. Act of June 25, 1947, ch. 125, 61 Stat. 163. In order to obtain registration, section 4 of the 1947 Act required that an applicant must submit a complete copy of the labeling accompanying a pesticide, a statement of all claims to be made for it, and, if requested by the agency administering the Act, a full description of the tests made and the results thereof upon which the claims were based. Until 1970, FIFRA was administered by the United States Department of Agriculture.[2] Material submitted to the Department of Agriculture was submitted in confidence. This is confirmed by the nature of the ma-

[2] Tolerances for pesticide chemicals were established by the Secretary of Health, Education and Welfare, through the Food and Drug Administration.

terials submitted and by the regulations of the Department of Agriculture which provided that "information relative to formulas of products acquired" under Section 4 of FIFRA could not be disclosed (7 C.F.R. § 370.13(c)(1)—1968 ed.), and that trade secret and confidential or privileged "commercial or financial information," including "Scientific and technical data on products or processing methods," "Data in research studies," and, generally, "Records concerning research project descriptions," would not be disclosed. 7 C.F.R. § 370.13(d)—1968 ed. This carried forward regulations which had long been in effect providing for the confidential treatment of data submitted in connection with registration applications.[3]

On December 2, 1970, all administrative functions relating to pesticides were transferred to the Environmental Protection Agency (EPA) under the provisions of Reorganization Plan No. 3 of 1970. 84 Stat. 2086.

In 1972, FIFRA was extensively amended. Act of October 21, 1972, P.L. 92-516, 86 Stat. 973. For the purpose of this case, the important change was made in section 3, which was amended to provide that research and test data submitted by a company in support of an application—

> shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to

[3] See 7 C.F.R. § 1.4(b)(15)—1962 ed., which provided that data concerning products and formulations provided by industry in connection with registration are administratively confidential, and 7 C.F.R. § 1.3(b)(1)—1949 ed., which provided that applications and supporting data would be available only to persons who furnished the material, or under compulsory process.

> pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b).

Section 10(b) of the 1972 Act, to which reference is made at the end of the indented quotation above, provides:

> Notwithstanding any other provision of this Act, the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential, except that, when necessary to carry out the provisions of this Act, information relating to formulas of products acquired by authorization of this Act may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator.

Thus, under the 1972 Act, if the information submitted in support of a registration application is not trade secret data—using "trade secret" to cover material within the provisions of section 10(b)—it may be considered by the Administrator for the benefit of a third party *only* (a) if the owner of the data grants the Administrator permission to use the data, or (b) if the applicant for whose benefit the data will be used agrees to pay the owner reasonable compensation.[4] If the data are "trade secret," including "commercial or financial information," within the meaning of section 10(b), then, without the owner's permission, *they cannot be used at all.*

[4] The validity of this compulsory license provision is not an issue in this case.

Under section 3(c)(2) of the 1972 Act, 7 U.S.C. § 136a(c)(2), data which are not "trade secrets" are for the first time to be made public by EPA, and are thereafter freely available for use by all, in the conduct of research, or otherwise, except for use of the data by an applicant for the purpose of registration of pesticides under FIFRA.

On November 19, 1973, the EPA Administrator published a document entitled "Registration of Pesticides," which was subtitled "Consideration of Data by the Administrator in Support of Application; Interim Policy" (hereafter referred to as the "Interim Policy Statement"). 38 Fed. Reg. 31862-31864 (1973). In the Interim Policy Statement, the EPA declared that the restrictions in section 3(c)(1)(D) on the Administrator's use of data submitted by previous applicants were applicable only to applications filed on or after the date of the Statement, that is, November 19, 1973. In the Statement, the EPA also took the position that the compensation provision of section 3(c)(1)(D) was applicable only to data submitted on or after October 21, 1972, the date of enactment of FIFRA of 1972, rather than to all data submitted in support of registration applications.

On May 20, 1975, the Administrator published proposed regulations under the Freedom of Information Act, 5 U.S.C. § 552. 40 Fed. Reg. 21987-22002. These regulations stated proposed procedures with respect to disclosure of data under section 10(b) of FIFRA of 1972.[5] Under section 2.307(g) of these proposed disclosure regulations, and despite the provisions of section 10(b), the Administrator took the position

[5] As pointed out above, section 10(b) of FIFRA of 1972, 7 U.S.C. § 136h(b), describes information which is not subject to public disclosure. If information submitted by an applicant falls within the description in section 10(b), section 3(c)(1)(D) provides that the Administrator may not use such information in support of a subsequent applicant's registration without the permission of the previous applicant.

that scientific data generally,[6] including but not limited to test methodology and results submitted to the Administrator under the original FIFRA and under FIFRA of 1972, were not entitled to confidential treatment.[7]

Following the issuance of the Interim Policy Statement, litigation was commenced on the questions whether the provisions of section 3(c)(1)(D) were (1) applicable to all data submitted in support of registration applications, or only to data submitted on or after October 21, 1972, and (2) whether the section became effective on October 21, 1972, the date of enactment, or on November 19, 1973, the date of publication of the Interim Policy Statement, as EPA contended.

Thereafter, on November 28, 1975, section 3(c)(1)(D) of FIFRA of 1972 was amended. Act of November 28, 1975, P.L. 94-140, 89 Stat. 751, 755. The 1975 amendment put section 3(c)(1)(D) into its present form. It provides that the section applies to all applications for registration submitted to EPA

[6] The term "scientific data" was defined in the proposed regulations so as to preserve confidentiality *only* for information concerning the confidential formula of a pesticide or the manufacturing and quality control processes employed in producing the pesticides. 40 Fed. Reg. 22000 and 40 Fed. Reg. 28815.

[7] In June, 1976, the Administrator began mailing "Notices of Determination" which advised the recipients that the EPA intended to disclose publicly information submitted by them, without any determination by the EPA as to whether the data were covered by section 10(b) of the Act, unless judicial relief was sought. Litigation followed. The one-judge court in this case held the Notice procedures invalid, stating in part that they "reflect application of the Administrator's faulty 'trade secret' definition." *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811, 829 n. 26 (W.D. Mo. 1978).

on or after October 21, 1972, rather than, as the EPA had contended, only to those applications submitted to the Agency on or after November 19, 1973. In addition, the 1975 amendment enacted the provision which gives rise to this case. Under the amendment, the use restrictions in section 3(c)(1)(D) are applicable only to data submitted to the EPA or its predecessor agencies "on or after January 1, 1970."[8] Thus, under the statute as amended, there is no restriction on the use by EPA of data submitted before January 1, 1970, and no provision for compensation for the use of such data. The date was apparently adopted as a Solomonic conference compromise,[9] and there

[8] The bill passed by the House [in 1975] contained no provision amending section 3(c)(1)(D). The House Committee stated that: "It was the Committee's intent at the time of the 1972 amendments and it is the Committee's intent now that section 3(c)(1)(D) of the Act be applied to all test data submitted to the EPA for registration purposes under this Act in the possession of EPA, regardless of whether it was submitted after October 21, 1972 or prior to such date." H.R. Rep. No. 94-497, 94th Cong., 1st Sess. 25 (1975). The Senate added section 12 to the bill, which would amend FIFRA of 1972 to provide compensation for data submitted "on or after October 21, 1972." S. Rep. No. 94-452, 94th Cong., 1st Sess. 4, 9-11 (1975).

When the bill went to conference, the Conference Report recited that "in the discussion of the bill on the *House* Floor, it was stated that it was the Committee's intent that on new registrations, the reasonable compensation data provision be applied regardless of when the data relied on was originally received by EPA." H.R. Conference Rep. No. 94-668, 94th Cong. 1st Sess. 5 (1975). The Conference Report adopted the January 1, 1970 date.

[9] The following appears in the transcript of the hearing in the court below (pp. 54-55):

> JUDGE HUNTER: What do you say the significance of the 1970 date is? Why that date? What significance, if any?
>
> MR. GRAY [counsel for the EPA]: It has the virtue of being a round number . . . [T]hey compromised on January 1, 1970. Just that simple. . . .

is nothing to indicate that the constitutional question was recognized or considered by the conference committee which proposed it.

B. Factual Background

The facts stipulated in the trial court show:

The Chemagro Agricultural Division of Mobay Chemical Corporation (hereafter referred to as "Mobay") has engaged in research and development activities with respect to agricultural and other pesticides for approximately twenty-four years, and has played a leading role in the development of agricultural pesticides which are systemic and non-persistent in the environment. (Stip. below pars. 5, 7, 8.)

During the period from 1954 to the present, Mobay has submitted substantial information, research and test data to the Department of Agriculture, the Food and Drug Administration, and the EPA in support of numerous applications for registration of pesticides under FIFRA and FIFRA as amended. On the basis of this information, research and test data, Mobay has obtained numerous pesticide registrations. (Stip. below pars. 12, 13.)

Mobay has spent and currently spends "multi-millions of dollars" annually in research and development activities to create the data necessary to develop, maintain, and expand its registered pesticide products. Specifically, the information, research and test data Mobay has submitted to support its registrations cost substantial sums of money to produce, are of great value when held in confidence, and are used by it both in the development of additional formulations for registered products and in the development of new products which are chemically re-

lated to products previously developed. (Stip. below pars. 17-20, 91-92, 111-112.)[10]

Since 1972, numerous registrations have been issued by the EPA to companies other than Mobay in reliance on information, research and test data submitted by Mobay. The information, research and test data relied upon by the Administrator to issue these registrations to third parties were initially submitted by Mobay both prior to and subsequent to January 1, 1970. The registrations were issued on the basis of the use of Mobay's data, without Mobay's permission, and without any offer of compensation to Mobay by the subsequent applicants. Since 1972, numerous registrants have submitted applications for registration of their products, which would require the Administrator to consider and use Mobay's data. Although issuance of these registrations would require consideration and use of Mobay's data submitted both before and after January 1, 1970, no offer of compensation has been made directly to Mobay, nor has its permission to use the data been requested. (Paragraphs 38, 39 and 50 of amended complaint; admitted in answer; stip. below pars. 43-45, 111-146.)

---

[10] The data developed and submitted by Mobay in connection with its pesticide registrations include, *inter alia*, biochemistry research involving the radiosynthesis of pesticide compounds, plant, animal and soil metabolism studies conducted with radiolabeled compounds, and environmental chemistry studies involving soil run-off and leeching, degradation in water and in soil, and photodecomposition. Also included in the data are acute and chronic mammalian, fish and wildlife toxicology studies, and research relating to formulation development and analysis, and manufacturing processes and results. It presently takes approximately eight years of integrated and coordinated research activities and the expenditure of $7-8 million to create the data necessary to support the initial registration of a single pesticide product. Plaintiff's exhibits below no. 1, nos. 4-1a through 4-88c, no. 6 and nos. 50-20a through 50-52a.

C. Proceedings Below

Initially, in 1975, prior to the 1975 amendment of FIFRA, Mobay brought an action in the district court for the Western District of Missouri for a declaratory judgment and injunction with respect to the consideration by the EPA Administrator of data, submitted in confidence by Mobay, to support registration applications of other companies. At that time, it was known only that one registration had been granted to a third party on the basis of Mobay's data, and several others were pending.[11] In May, 1975, the Administrator was preliminarily enjoined from consideration of all Mobay data in support of a third party's registration, no matter when submitted, where permission for use had not been granted by, and no specific offer of compensation had been made to, Mobay. *Mobay Chemical Corp.* v. *Train,* 394 F. Supp. 1342, 1348-1350 (W.D. Mo. 1975).

On April 23, 1976, Mobay amended its complaint to challenge on constitutional grounds the 1975 amendment to FIFRA which limited the restrictions on use, and the provisions for compensation set forth in FIFRA of 1972, to data submitted after January 1, 1970.[12] In its amended complaint Mobay asked that

[11] Mobay's permission to use the data was neither sought nor granted, nor was an offer of compensation made.

[12] Other issues raised in the amended complaint included, *inter alia,* the definition of a trade secret adopted by the Administrator, the legality of the Administrator's actions in issuing registrations to others in reliance on Mobay's data, and the validity of the Interim Policy Statement.

The single district judge decided the issues other than the constitutional question. *Mobay Chemical Corp.* v. *Costle,* 447 F. Supp. 811 (W.D. Mo. 1978). Both parties took appeals from the decision

EPA be enjoined from application of the limitation of section 3(c)(1)(D) of FIFRA, as amended, to data submitted "on or after January 1, 1970," in that it effects a governmental taking of Mobay's property, that is, data submitted on a confidential basis prior to January 1, 1970, for private purposes, and without just compensation in violation of the Fifth Amendment. Mobay requested that a three-judge court be convened to consider the constitutionality of the 1970 cut-off.

The three-judge court held that while Mobay's interest in the data submitted to EPA or its predecessors is an interest in property (App. A, *infra,* pp. 9a-11a), the limitation of section 3(c)(1)(D) to data submitted on or after January 1, 1970, does not effect a taking of the property submitted before that date. The court then concluded that because there was no taking, it was unnecessary to decide the question whether the alleged taking was for a private or public purpose. (App. A, *infra,* p. 21a.)

THE QUESTIONS ARE SUBSTANTIAL

1. The Court Has Jurisdiction.

The decision of the three-judge court involves a significant and important question as to the constitutionality of an Act of Congress. Such a question warrants review by this Court. Section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended in 1975, 7 U.S.C. § 136a(c)(1)(D), *supra,* p.

of the single judge on the issues decided by him (which did not include the constitutional claim presented here) to the United States Court of Appeals for the Eighth Circuit. On joint motion, an order dismissing both appeals with prejudice was entered on July 6, 1978.

3, provides for EPA's use for the benefit of others of valuable confidential private property, without compensation, when this property was submitted to the government before January 1, 1970. This effects a taking of private property in violation of the due process and just compensation clauses of the Fifth Amendment. The three-judge court specifically addressed that question and decided it against the constitutional claim. Thus the case falls directly within the jurisdictional statute. 28 U.S.C. §§ 1253, 2282 (1970).

2. The Question of "Taking" Is Novel and Substantial.

In reaching its result, the three-judge court concluded that there was not a "taking" of Mobay's property, as that term is used in the Fifth Amendment.[13] This construction of the constitutional provision is erroneous when applied to intellectual property whose value lies in its exclusive use by its owner. The statute makes research and test data, confidentially submitted to EPA or its predecessor agencies prior to 1970, freely available for the benefit of other private companies, without any compensation to the owner of the data.

The court below concluded that there is a property interest in the data provided in support of pesticide

[13] Thus the question in this case is unlike the questions presented in *Chrysler Corp.* v. *Brown*, No. 77-922, *certiorari granted*, March 6, 1978, which arise under the Freedom of Information Act, and do not involve any claim that there is a property interest in information submitted to the government which has not been afforded due process protections. The court of appeals there did not reach the due process issue, calling the record at that stage of the case "too speculative," and noting that no final decision to release the information had been made. 565 F.2d 1172, 1193 (3rd Cir. 1977).

registrations.[14] But the court held that the statute does not effect a taking because the owner of the data remains able to use it. That rationale, while perhaps relevant to the question whether there has been a taking of tangible property by regulating its use (*cf. Penn Central Transportation Co.* v. *New York City*, No. 77-444 (slip op. at 18), decided June 26, 1978), completely ignores the inherent differences between tangible and intellectual property. The value of intellectual property lies in its *exclusive* use by its owner; and this right is recognized and protected as a property interest in our law. *Cf. Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470.

The court below said, "This Court simply cannot reasonably conclude that the Administrator's mere consideration of data . . . without disclosing the contents of that data to any other person . . . violates the Fifth Amendment to the United States Constitution." (App. A, *infra*, p. 19a.) This is both mistaken and inadequate. In a traditional trade secret or know-how case, the plaintiff proves either that the defendant is using a trade secret obtained by unfair means, or that use of the trade secret by the defendant is in violation of trust or confidence, to the injury of the plaintiff. Here, Mobay submits its property in confidence for a specific and limited purpose, and then the EPA uses it for the direct benefit of subsequent applicants.[15] Whether the

[14] This Court has said in regard to the Fifth Amendment that "The constitutional provision is addressed to every sort of interest the citizen may possess." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378. *See also Pearson* v. *Dodd*, 410 F.2d 701, 707-708 (D.C. Cir. 1969); *Com-Share, Inc.* v. *Computer Complex, Inc.*, 338 F. Supp. 1229 (E.D. Mich. 1971), *aff'd*, 458 F.2d 1341 (6th Cir. 1972).

[15] In *United States* v. *General Motors Corp., supra*, 323 U.S. at 378, this Court said: "The courts have held that the deprivation of

information is actually disclosed to the subsequent applicants is not material, because EPA gives the other applicants the use and benefit of the information for purposes of registration of their products. Thus, Mobay has sustained the same type of injury, and later applicants have obtained the same advantage, which can only mean that plaintiff's property, the fruit of its economic investment, and having clear and substantial value, has been taken from it, and its benefit given, at no cost, to subsequent applicants.

3. It Is Important to Clarify the Proper Treatment of Confidential Data by EPA and Other Agencies.

The course of conduct of the EPA, outlined above, from the date of enactment of the 1972 amendments to FIFRA to the present, evidences continuing disregard of the requirements of the Constitution with respect to the use by the government of intellectual property belonging to others. There has been resistance by the EPA in applying the specific statutory mandates of FIFRA respecting the consideration, use and disclosure of data submitted to it:

(1) No implementation of section 3(c)(1)(D) was made until November 19, 1973, the date of publication of the Interim Policy Statement,[16] rather than enforcing the restrictions as of the date of their enactment.

---

the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." Here Mobay is a "former owner," once such data have been used for the benefit of others.

Cf. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 78-80. *See also Eyherabide* v. *United States*, 170 Ct. Cl. 598, 606, 345 F.2d 565, 570 (1965), where the court said: "If the Government's encroachments on private property make it possible for another to get the benefits of that property, the United States is liable just as if it used the property for itself."

[16] 38 Fed. Reg. 31862 (1973).

(2) In the Interim Policy Statement, EPA provided that only data submitted on or after October 21, 1972, was protected by section 3(c)(1)(D), although the statute and the legislative history of the 1972 Act indicate that all data submitted were to be so protected.[17]

(3) EPA similarly ignored the legislative history of the definition of a trade secret under section 10(b),[18] and instead proposed another definition.

---

[17] Section 3(c)(1)(D), as passed by the House of Representatives in November 1971, contained a provision stating that data submitted under FIFRA could not be considered in support of a third party's application without permission of the applicant who originally submitted the information. The Senate retained the exclusive use provision but added a mandatory licensing provision for test data with payment of a reasonable share of the cost of producing the data. The Senate [in 1972] contemplated that the compensation provided under the mandatory licensing clause would apply to all data, and, in fact, the Senate Committee rejected an amendment which would have limited compensation to data submitted after the effective date of the Act. *See Hearings on H.R. 10729, Before the Subcomm. on Agriculture Research and General Legislation of the Senate Comm. on Agriculture & Forestry*, 92d Cong., 2d Sess. pt. 2 at 276 (1972); proposed amendment to H.R. 10729 No. I submitted to the Senate Committee on Agriculture & Forestry; S. Rep. No. 92-838, 92d Cong., 2d Sess. 10-11 (1972); 118 Cong. Rec. S15893 (daily ed. Sept. 26, 1972) (Remarks of Senator Allen); and S. Rep. No. 92-838, 92d Cong., 2d Sess. pt. 2 at 69-73 (1972); 118 Cong. Rec. S15894 (daily ed. Sept. 26, 1972). *See also* H. R. Rep. No. 94-497, 94th Cong., 1st Sess. 25 (1975), *supra*, p. 9, n. 8.

[18] A number of courts have considered the definition of a trade secret used by the EPA and found it erroneous. Each court found that the legislative history of FIFRA approved the use of the definition found in the Restatement of Torts, Section 757, Comment b. *See Dow Chemical Co.* v. *Costle*, No. 78-10087 (E.D. Mich. Nov. 16, 1977); *Chevron Chemical Co.* v. *Costle*, 443 F. Supp. 1024 (N.D. Cal. 1978); and *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978).

(4) In June, 1976, after the enactment of FIFRA of 1975, EPA began mailing "Notices of Determination," which would result in public disclosure of data, without the specific determination contemplated by FIFRA of whether the data were protected under section 10(b) of the Act. (Stip. below at 98-103.)

(5) EPA also disregarded restrictions on the use of data in connection with the re-registration of pesticides.[19]

Each of these actions taken by the EPA involved a failure to appreciate the rights of a pesticide registrant in connection with the use and disclosure of data it submits in support of registration. Each action has been overturned by Congress or the lower courts.

It is clear even from this brief recitation that EPA has failed to protect the proprietary rights of registrants in the intellectual property which they have created. If Congress is allowed to provide for the uncompensated use of a person's private property for the benefit of his competitors, all those now developing and submitting intellectual property to EPA and to other agencies of the government[20] will be discouraged. Companies will become reluctant to undertake

[19] *See Dow Chemical Co.* v. *Train*, 423 F. Supp. 1359, 1366 (E.D. Mich. 1976); and *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978).

[20] In addition to several other programs administered by EPA, extensive submission of test data is required by the Food and Drug Administration for the licensing of antibiotics, new animal drugs, and biological products such as viruses, toxins and serums. *See* 21 C.F.R. §§ 431.1(e), 514.1, 601.25 (1977). *See also* 9 C.F.R. § 102.3 (1977). Similar requirements are found in Nuclear Regulatory Commission regulations relating to licensing of those owning, manufacturing, distributing or importing certain radioactive materials. *See* 10 C.F.R. §§ 30.53, 40.63, 50.34, 50.34a and 50.36 (1977).

the investment in innovative and creative research on the scientific frontiers which is necessary for the discovery of new, more selective, and safer pesticides, and for similar advances in other areas. Thus, the decision of the three-judge court will provide a chilling effect on research and development efforts in every sector of the economy which is subject to federal regulation.

Even though many pesticides are on the market today, the problem is to encourage innovation and exploration. There is need to develop wholly new classes of compounds. Rather than pioneering this development, companies will hesitate to be the first to come forward with a new product, fearing that competitors may enjoy the benefits of their investment, or hoping that they may wait and reap the harvest from the investments of others. Environmental and agricultural interests alike will suffer. A decision with the potential to produce this undesirable, and economically and legally unsound result presents a substantial question, and should not be permitted to stand without consideration by this Court.

CONCLUSION

A decision by this Court in this case is necessary to establish adequate protection against government misuse of confidential intellectual property, and to prevent the misappropriation of such property by the government for the benefit of others who have in no way contributed to the production of the valuable property involved, all contrary to the due process and just compensation provisions of the Fifth Amendment. The resolution of this question is important both to the government and to many private parties. The question is real, constitutional, continuing, not covered by any existing decision, and substantial.

Probable jurisdiction should be noted.

Respectfully submitted,

ERWIN N. GRISWOLD
Counsel for the Appellant

Of Counsel:

LINDA K. SMITH
CAROL ANN MOONEY
JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

JOSEPH E. STEVENS, JR.
C. DAVID BARRIER
LATHROP, KOONTZ, RIGHTER, CLAGETT, PARKER & NORQUIST
1500 TenMain Center
Kansas City, Missouri 64105

August 1978.

APPENDIX A

Opinion and Order of the United States District Court for the Western District of Missouri, Western Division, March 28, 1978

APPENDIX A

Opinion and Order of the United States District Court for the Western District of Missouri, Western Division, March 28, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 75 CV 238-W-4
No. 76 CV 351-W-4

MOBAY CHEMICAL CORPORATION, *Plaintiff*,

vs.

DOUGLAS COSTLE, Administrator, United States Environmental Protection Agency, *Defendant*.

(FILED MARCH 28, 1978)

Before Floyd R. Gibson, Chief Circuit Judge, William H. Becker, Senior District Judge, and Elmo B. Hunter, District Judge.

Opinion and Order

HUNTER, District Judge.

Plaintiff, a firm engaged in the business of developing, producing and marketing pesticides for agricultural and industrial use, seeks an Order of this Court enjoining defendant from further enforcement and application of § 3 (c)(1)(D) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136a(c)(1)(D), as amended, as violative of the Fifth Amendment to the Constitution of the United States. By Order entered July 20, 1976, this three-judge court was empanelled pursuant to 28 U.S.C. § 2284. Oral arguments were presented on November 29, 1977, and following submission of supplemental briefs, the constitutional issue[1] was fully and finally submitted to this Court on January 16, 1978.

---

[1] In addition to the constitutional question now before this Court, plaintiff raised numerous claims for declaratory and injunctive

Background

The relevant facts are as follows. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 135 *et seq.*, enacted in 1947 to require registration of certain pesticides, originally applied only to pesticides shipped in interstate commerce. The Act was administered by the United States Department of Agriculture.[2] Tolerances for pesticide chemicals were established by the Secretary of Health, Education and Welfare. In 1970, both of these administrative functions were transferred to the Environmental Protection Agency (EPA) under the provisions of Reorganization Plan No. 3, 35 Fed. Reg. 15623 (1970). In order to satisfy the requirements of these administering agencies, applications for registration of pesticides and for tolerances had to be supported by substantial amounts of information, research and test data regarding the pesticide chemical.

In 1972, FIFRA was amended by Section 2 of the Federal Environmental Pesticide Control Act (FEPCA), Pub. L. No. 92-516, 92d Cong., 2d Sess. (Oct. 21, 1972), 86 Stat. 973. In essence, the 1972 amendments completely rewrote the statute to create a comprehensive regulatory program governing the manufacture, distribution, and use of pesti-

---

relief which were heard and determined, following trial, by Judge Hunter. See Mobay Chemical Corp. v. Costle, 447 F. Supp. 811 (W.D. Mo. 1978).

[2] Before any pesticide could be marketed in interstate commerce, FIFRA required that the producer have the pesticide registered. In order to obtain registration, the applicant for registration was required to demonstrate to the satisfaction of the Secretary of Agriculture the safety and efficacy of the pesticide product. If the use of a pesticide could result in a residue in or on food crops, a tolerance for such use also had to be established pursuant to § 408 of the Food, Drug and Cosmetic Act.

cides.[3] Central to the regulatory scheme established in FIFRA of 1972 was Section 3, 7 U.S.C. § 136a, which required registration of pesticides sold or shipped in commerce and prescribed standards and procedures for registration. Section 3 authorized the Administrator of the EPA to require applicants for registration to submit data supporting the safety and efficacy of the product for which registration is sought, but provided that data submitted in support of an application should not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless the other applicant has first offered to pay reasonable compensation for producing the test data to be relied upon and the data does not contain or relate to trade secrets or confidential financial or commercial information.[4]

---

[3] "Section 2 of the bill contains a series of amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) which completely rewrite that statute. The thrust of these amendments is to change FIFRA from a labeling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution, and use of pesticides." See H.R. Rep. No. 92-511, 92nd Cong., 1st Sess. at 1.

[4] § 3(c)(1)(D) of FIFRA of 1972, 7 U.S.C. § 136a(c)(1)(D) (1972), provided: "Each applicant for registration of a pesticide shall file with the Administrator a statement which includes . . . . (D) if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b). If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If the owner of the test data does not agree with said determination, he may,

Thus, the 1972 version of § 3(c)(1)(D) created a mandatory licensing system for test data which was not protected from disclosure by § 10(b) of the Act. The 1972 amendments, however, did not clearly indicate whether the § 3 (c)(1)(D) restrictions on use of data by the Administrator and the provision for compensation of original applicants applied to all data ever submitted to the EPA or its predecessor agencies, or whether they applied instead only to data first submitted after enactment of the 1972 amendments. Litigation on that issue was commenced.

In 1975, Congress amended § 3(c)(1)(D), and that amendment is the subject of this proceeding. As it presently reads, § 3(c)(1)(D) of FIFRA provides:

> (c) Procedure for Registration
>
> (1) Statement required—Each applicant for registration of a pesticide shall file with the Administrator a statement which includes—
>
> •
>
> •
>
> •
>
> (D) If requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted on *or after January 1, 1970,* in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 136h(b) of this title. This provision with regard to compensation for producing the test data to be relied upon shall apply with respect to all applications for registration or reregistration submitted on or after October 21, 1972. If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If either party does not agree with said determination, he may, within thirty days, take an appeal to the Federal district court for the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. Registration shall not be delayed pending the determination of reasonable compensation between the applicants, by the Administrator or by the court. [Emphasis supplied.]

within thirty days, take an appeal to the federal district court for the district in which he resides with respect to either the amount of the payment or terms of payment, or both. In no event shall the amount of payment determined by the court be less than that determined by the Administrator."

Under the 1975 amendment, the restrictions on the use which the Administrator may make of data submitted to him apply only to data first received by the agency on or after January 1, 1970. Neither the submitter's consent nor an offer of compensation by the second applicant is required with respect to data submitted prior to 1970.

The Issues

Plaintiff contends that the 1970 "cutoff date" is unconstitutional because it constitutes a governmental taking for a private purpose and without compensation, thereby depriving plaintiff of its property without due process of law. Plaintiff seeks an Order of this Court declaring that § 3(c)(1)(D), as amended, is unconstitutional insofar as it operates to allow the Administrator either (1) to consider plaintiff's pre-1970 "trade secret"[5] data in support of

[5] Throughout this opinion, the term "trade secret" will be utilized with reference to data protected by § 10(b) of FIFRA, that is, material which "contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential." 7 U.S.C. § 136h(b).

another firm's application for registration without plaintiff's consent, and (2) to consider plaintiff's pre-1970 non-"trade secret" data in support of another firm's application without an offer by the second firm to reasonably compensate plaintiff for producing the data relied upon. In effect, therefore, plaintiff asks this Court to excise from § 3(c)(1)(D) the phrase "on or after January 1, 1970," which was added by the 1975 amendment.

Defendant asserts that the 1975 amendment to § 3(c)(1)(D) is a valid exercise of Congress' power under the Constitution to regulate commerce and to make laws necessary and proper for that purpose. According to defendant, the section effects no taking of plaintiff's property. In addition, defendant asserts that even if a taking does result from the operation of § 3(c)(1)(D), it is a taking for public purposes authorized under the commerce clause, and plaintiff is not entitled to the relief it seeks herein for the reason that Congress has provided an adequate legal remedy under which plaintiff may obtain just compensation by bringing an action in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491, as amended.

The issues before this Court, therefore, are:

(1) Does the 1970 cutoff date in § 3(c)(1)(D) of FIFRA effect a taking of plaintiff's property?

(2) If there is a taking, is it for a public purpose?

(3) If there is a taking for a public purpose without just compensation, does plaintiff have an adequate legal remedy under the Tucker Act?

The Merits

Plaintiff may succeed with its claim for injunctive relief against the operation of § 3(c)(1)(D) of FIFRA, as

amended,[6] only by a showing that (1) the 1970 cutoff date works a taking of plaintiff's property, and *either* (2) the taking is solely for private, rather than public, purposes,[7] *or* (3) there is no payment of just compensation to plaintiff for the property taken.[8] Absent a taking, of course, plaintiff is entitled to no relief. Even if a taking does result from the operation of the statute, a taking for a public purpose ordinarily would entitle plaintiff only to just compensation, rather than injunctive relief, for the property taken.[9] If there is a taking for a public purpose plaintiff might or might not have a remedy in the Court of Claims under the

---

[6] There is no dispute between the parties as to the fact that the portion of § 3(c)(1)(D) which limits the applicability of the section to data submitted "on or after January 1, 1970" may be severed from the Act if this Court finds it constitutionally invalid. Section 26 of FIFRA of 1972, as amended, 7 U.S.C. § 136x, provides that "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this Act which can be given effect without regard to the invalid provision or application, and to this end the provisions of this Act are severable."

[7] Missouri P.R. Co. v. Nebraska, 163 U.S. 403 (1896); Citizens' Sav. & Loan Ass'n. of Topeka, 20 Wall (U.S.) 655, 22 L. Ed. 455 (1875); Cole v. City of LaGrange, 113 U.S. 1 (1885); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1904); Panhandle Eastern Pipe Line Co. v. State Hwy. Comm'n., 294 U.S. 613 (1934), reh. den. 295 U.S. 768 (1934).

[8] Cole v. LaGrange, *supra;* Delaware, L. & W. R. Co. v. Morristown, 276 U.S. 182 (1927); Smyth v. Ames, 169 U.S. 466 (1897).

[9] Plaintiff asserts that money could not compensate for the taking of its proprietary information, and thus an injunction should issue according to traditional equitable principles because the legal remedy is inadequate. Plaintiff further contends that an injunction is appropriate here because the 1975 amendment to § 3(c)(1)(D) provides no compensation for the "taking" of plaintiff's data submitted prior to 1970. These issues need not be reached at this juncture.

Tucker Act.[10] Consequently, the first issue to be resolved is whether or not the 1970 cutoff date in § 3(c)(1)(D) works a taking of plaintiff's property.

I. The Taking Issue

Plaintiff does not contend that the alleged proprietary right to its property on which this claim is based arises from § 3(c)(1)(D) of FIFRA of 1972. The general rule is that powers derived wholly from a statute are extinguished by its repeal, Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), cert. denied, 335 U.S. 887 (1948); Flanigan v. County of Sierra, 196 U.S. 553 (1905); thus, if plaintiff's alleged rights arose solely from FIFRA of 1972, they were extinguished in 1975 by the amendment to § 3(c)(1)(D).

[10] The Tucker Act, 28 U.S.C. § 1491, provides that "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ." The Court of Claims does not administer injunctive or declaratory relief; its jurisdiction is limited to money claims against the United States government. United States v. King, 395 U.S. 1, 2 (1969); Richardson v. Morris, 9 U.S. 464 (1973). Plaintiff's Tucker Act claim, if any, would be founded "upon the Constitution." A serious question would exist, however, as to whether or not plaintiff would have a claim "against the United States," for although plaintiff alleges that a taking results from the act of an official of the United States pursuant to a statute enacted by Congress, plaintiff does not seek compensation from the United States. Rather, plaintiff seeks an order compelling third parties to pay compensation according to the scheme established under FIFRA of 1972, and the thrust of plaintiff's complaint is an attack upon the statute itself, which provides *no* compensation for data submitted prior to 1970, rather than an attempt to obtain a money judgment. Further, given the ongoing nature of the "taking" which plaintiff asserts, determination of the amount of compensation due would appear to be a continuing issue; for example, each consideration by the Administration of plaintiff's pre-1970 data in support of another's application for registration might be viewed as a separate "taking," necessitating repeated suits for money damages in the Court of Claims.

Instead, plaintiff asserts that § 3(c)(1)(D) as it originally was enacted in FIFRA of 1972 merely recognized and codified, plaintiff's rights as they previously existed.[11] According to plaintiff, its information, research, and test data constitute, and always have constituted, private "property" within the meaning of the Fifth Amendment, which prohibits the deprivation of "property" without due process of law, and provides that private property shall not be taken for public use without just compensation.

Defendant does not dispute that plaintiff's information, research, and test data may be considered "property," and this Court does not find otherwise. The word "property," as utilized in the constitutional sense long has been interpreted broadly, to embrace all valuable interests which a person may possess outside of himself—outside of life and liberty. See Campbell v. Holt, 115 U.S. 620, 630 (1885). In discussing the meaning of "property" as the term is used in the Fifth Amendment, the United States Supreme Court stated in United States v. General Motors Corp., 323 U.S. 373-377-78 (1945), as follows:

> It is conceivable that the . . . [term property] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. [Citation omitted.] When the sovereign exercises the power of eminent

[11] Plaintiff does not contend that the regulation of the use of its information, research, and test data embodied in § 3(c)(1)(D) of FIFRA of 1972 suffers from any constitutional infirmity.

> domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

As plaintiff points out, general recognition of the status of at least some of its information, research and test data as property also has been given by the federal government. The Attorney General has stated, with regard to the exemption from disclosure of matters within Section 3(e)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (that is, matters which are "trade secrets and commercial or financial information obtained from any person and privileged or confidential"):

> An important consideration should be noted as to formulae, designs, drawings, *research data,* etc., which though set forth on pieces of paper, are significant not as records but as *items of valuable property.* These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that the Congress intended, by subsection (c), to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, such property in the hands of the United States should be covered under exemption (e)(4). [5 U.S.C. § 552(b)(4)] [Emphasis supplied.]

Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative

Procedure Act, "A Memorandum for the Executive Departments and Agencies concerning Section 3 of the Administrative Procedure Act as revised effective July 4, 1967" (June 1967), p. 34.

That plaintiff's data, or a portion thereof, may constitute "property," however, does not answer the question of whether defendant's actions pursuant to § 3(c)(1)(D) as amended in 1975 constitute a "taking" of data submitted by plaintiff prior to 1970. In other words, has plaintiff been unconstitutionally *deprived* of its "property"? Plaintiff claims the right to prevent others from use of its pre-1970 data which is trade secret, and the right to compensation for the use of its pre-1970 data which is not trade secret, and contends that the deprivation of that interest in its "property" violates the Fifth Amendment. This Court finds that it does not.

It is true that all great powers of Congress, including the commerce power upon which FIFRA is founded, are subject to the Fifth Amendment. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935); see Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824). It further is true, as plaintiff asserts, that a point exists where regulation may be so severe as to be a taking. See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 383, 413 (1922). If the United States eliminates or substantially impairs an owner's use of his property, or requires him to convey it, there is a taking, which gives rise to a claim under the Constitution, whether or not the United States so intended. United States v. Causby, 328 U.S. 256 (1946); In re Penn Central Transp. Co., 384 F. Supp. 895, 936 (Special Court 1974).

But due process of law never has meant complete absence of restraint on property. The constitutional right of property is not an absolute right. It is subject to such reasonable restraints and regulations as Congress, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient. Whether

there has been a denial of due process must be determined by taking into account the purposes of regulation and its effect upon the rights asserted, and all of the circumstances which may render the regulation appropriate to the nature of the case. Acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may in a measure impair its use, do not constitute a "taking" in a constitutional sense. Chicago, B. & A. R. Co. v. Illinois, 200 U.S. 561 (1905).

Thus, the takings clause ordinarily is not offended by regulation of uses,[12] even though the regulation may severely or even drastically affect the value of the property. See Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); City of St. Paul v. Chicago, St. P. M. & O. Ry. Co., 413 F. 2d 762, 767 (8th Cir. 1969). A particular use of property may be regulated or forbidden without constituting a taking. Even if the highest-value use of property is forbidden by regulation, no taking has occurred so long as

[12] "Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'Police Laws or Regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally." L'Hote v. New Orleans, 177 U.S. 584, 599 (1899).

other lower-valued, reasonable uses are left to the property owner. Goldblatt v. Town of Hempstead, supra, 369 U.S. at 592; South Terminal Corp. v. EPA, 504 F. 2d 646, 678 (1st Cir. 1974); Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709 (D. N.J. 1976).

The test of whether a particular enactment falls within the valid exercise of Congressional power so as not to run afoul of the Fifth Amendment is one of reasonableness. See City of St. Paul & Chicago, St. P. M. & O. Ry. Co., supra, 413 F. 2d at 767. As long as the means chosen by Congress are reasonably appropriate to the legitimate Congressional purpose for which they are adopted, traditional private property rights must yield where their exercise interferes with a Congressional proscription pursuant to a legitimate power of Congress. See Atlanta v. Nat'l. Bituminous Coal Comm'n., 26 F. Supp. 606-610 (D. D.C. 1939), aff'd 308 U.S. 517 (1939); United States v. Carolene Products Co., 304 U.S. 144, 148-49 (1938); United States v. California, 297 U.S. 175, 184-85 (1936).

The Congressional power under which the 1975 amendments to FIFRA were enacted is the commerce power.[13] In the exercise of its constitutional jurisdiction over interstate commerce, Congress has authority, integral to the exercise of its commerce power, which is analogous to the police power of the states. See Lamm v. Volpe, 449 F. 2d 1202, 1203 (1971), cert. denied, 405 U.S. 1075 (1971); F.P.C. v. Natural Gas Pipeline Co., 315 U.S. 575, 582 (1942); South Terminal Corp. v. EPA supra, 504 F. 2d at 677; Oklahoma City v. Sanders, 94 F. 2d 323, 327 (10th Cir. 1938); Speert v. Morganthau, 116 F. 2d 301, 305 (D.C. Cir. 1940); Clover Leaf Butter Co. v. Patterson, 315 U.S. 148, 163 (1942). Thus Congress may prescribe police regula-

[13] Art. I, Sec. 8, cl. 3 of the Constitution of the United States confers power on Congress "To regulate Commerce . . . among the several States . . . ."

tions to effectuate the regulation of interstate commerce, thereby obtaining results reasonably conceived to benefit public health and/or welfare. See Cloverleaf Butter Co. v. Patterson, supra, 315 U.S. at 163; United States v. Darby, 312 U.S. 100, 115 (1940); McCray v. United States, 195 U.S. 27, 55 (1903); Veazie Bank v. Fenno, 8 Wall. (U.S.) 533, 19 L. Ed. 482 (1869); see also Carolene Products Co., 304 U.S. 144 (1938); Cleveland v. United States, 329 U.S. 14, 19 (1946); Berman v. Parker, 348 U.S. 26, 32 (1954); Village of Belle Terre v. Boras, 416 U.S. 1, 9 (1974).

Pursuant to this authority to regulate commerce, Congress enacted § 3 of FIFRA, as amended, which requires the registration of pesticides before entering commerce. § 3 (c)(1) establishes procedures for conducting that registration program, by authorizing the Administrator of the EPA to require the submission of data in support of registration and instructing the Administrator regarding the use to be made of that data. The scheme established in § 3 implicitly recognizes that data submitted by one applicant has potential relevance to applications which may be submitted by others in order to register similar products. At the same time, the regulatory scheme recognizes that the expenditure of the first applicant in generating the data submitted in support of its registration is entitled to a certain amount of protection.

Contrary to plaintiff's assertions, however, neither the legislative history nor the plain language of § 3 indicate that in adopting its regulatory scheme Congress was concerned with ensuring maintenance of competitive commercial positions of the original submitters of data. Rather, the Congressional concern in adopting the original § 3(c)(1)(D) in 1972 was for maximum allocation of resources in the public interest—preventing the necessity of costly duplicative testing in order to produce governmentally-mandated data without thereby casting the entire burden upon the

party first to meet the government requirements by producing and submitting that data:

> As concerns use of such data in *support* of *another* application without permission of the originator of the test data, however, it is recognized that in certain circumstances it might be unfair or inequitable for government regulation to require a substantial testing expense to be borne by the first applicant, with subsequent applicants thereby gaining a free ride. On the other hand, unnecessary duplicative testing would represent a wasteful, time-consuming, and costly process resulting in a substantial misallocation of resources. Thus it was decided that fairness and equity require a sharing of the governmentally required cost of producing the test data used in support of an application by an applicant other than the originator of such data. S. Rep. No. 92-838, 92nd Cong., 2d Sess., pt. 2, 72-73 (1972). [Emphasis in original.]

The legislative history reflects that the underlying concern was to assure public safety without inhibiting—indeed, while encouraging—research in pesticide production.[14]

---

[14] The Senate Committee on Agriculture and Forestry expressed a similar view:

"In the Committee's view, this resolution best serves the primary purpose for inclusion of section 3(c)(1)(D) in the Act. As developed more fully in the Committee reports accompanying the 1972 amendments, this provision was added to provide for equitable sharing among industry members of the cost of producing data necessary to obtain or continue a registration under the Act. It was apparent that new data requirements would be imposed by the Administrator, and that satisfaction of these data requirements would involve considerable expense. The provision reflects the sound conclusion that all persons who wish to profit from the fruits of this expense should have to bear a fair share of the financial burden. In view of its purpose, it would seem sound not to require cost sharing with respect to "old data." To make the provision applicable to "old data" could create a windfall for producers of this data since such data was prepared without any

The legislative history further reveals that the 1975 amendment to § 3(c)(1)(D) was intended to "clarify the intent of the [1972] law" in view of the fact that "the question of data compensation was being litigated in several courts and . . . this litigation was holding up the registration of pesticides by the EPA." Cong. Rec., S., Nov. 19, 1975, p. 20460 (remarks of Senator Allen).[15] In adopting the 1975 amendment, Congress obviously was concerned with the possible adverse effects resulting from the uncertainty of coverage of the 1972 law [16] as well as with the effect on competition in the industry if all data were included within the limitations of § 3(c)(1)(D).[17] The history

---

reasonable expectation that the law would require sharing of the costs of production." H.R. Rep. No. 94-668, 94th Cong., 1st Sess. (1975) at 2.

[15] The Senate Committee on Agriculture and Forestry wrote a detailed explanation of its purposes in amending § 3(c)(1)(D):

> "As noted above, it became apparent at the hearings that a number of important problems had arisen during the implementation of this section. While litigation is in progress which may resolve some of the problems, the time required to resolve these matters in the courts would needlessly prolong uncertainty, and unnecessarily hobble the efforts of EPA to implement the Act. Accordingly, it was determined to be in the public interest to remove any doubt concerning the proper resolution of some of the key issues by amendments to section 3(c)(1)(D) of the statute . . . ."

Id.

[16] See Hearings before the Subcommittee on Agricultural Research and General Legislation of the Committee on Agriculture and Forestry, United States Senate, 94th Cong., 1st Sess., on H.R. 8841, and House of Representatives Report No. 94-497, Extension and Amendment of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, and particularly the supplemental views thereto of Hon. Keith G. Sebelius, Hon. Charles Thone, and Hon. Jerry Litton.

[17] See H.R. Rep. No. 94-497, 94th Cong., 1st Sess. (1975) at 25; 121 Cong. Rec. H. 9582 (remarks of Congressman Sebelius, Oct. 3, 1975); 121 Cong. Rec. S. 20461 (remarks of Senator Hart, Nov. 10, 1975).

specifically reflects Congressional consideration regarding the reasonableness of *not* requiring cost sharing with respect to "old data," that is, data submitted prior to 1970, for the reason that it would create a "windfall" for producers of the data.[18] In reaching the 1970 cutoff date, as opposed to applying the § 3(c)(1)(D) provisions to all data or only to data submitted after October 21, 1972--the effective date of the Act, it appears that the dominant Congressional purpose was to reach a reasonable compromise between the competing interests of those seeking to register pesticide products and thereby to end the problems delaying effective implementation of FIFRA. See, e.g., Hearings on H.R. 8841 Before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry, 94th Cong., 1st Sess., at 151 (1975).

This Court finds the Congressional objectives embodied in the 1975 amendment to § 3(c)(1)(D) to be legitimate subjects of Congressional concern and properly within the Congressional authority to regulate commerce. We further find, for the reasons set forth below, that § 3(c)(1)(D), as amended, constitutes a means reasonably related to the legitimate Congressional purposes for which it was enacted.

Plaintiff correctly asserts that "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." United States v. General Motors Corp., *supra*, 323 U.S. at 378; United States v. Miller, 317 U.S. 369 (1943). Under the circumstances presented herein, however, this Court has difficulty ascertaining any real deprivation to plaintiff. Plaintiff produces data which it is required to produce under government regulation which plaintiff does not contest. Plaintiff voluntarily submits that data to the Administrator of the EPA, and it is used by the Administrator in

---

[18] S. Rep. No. 94-452, 94th Cong., 1st Sess. 1975) at 10-11.

support of plaintiff's application for a pesticide registration. The data remains in the agency's files, where it is used to support other applications for the same or similar products which plaintiff may make in the future. Plaintiff retains a copy of its data to use for its own purposes. The data is not transferred by the agency to any third parties.

Plaintiff has neither stated nor shown that its own actual use of its data has been diminished in any respect; plaintiff may continue to use its "property" as it has in the past. The statute subjects that "property" to no burden, casts no duty or restraint upon it, and only in an indirect way, if any, can it be said that its pecuniary value is affected by the statute. All other accoutrements of ownership remain with plaintiff. Thus, the sole "property interest" which plaintiff claims is diminished by the 1970 cutoff date of § 3(c)(1)(D) is an alleged right to *exclusively* use the data; that is, to prevent others from using it. Defendant responds that plaintiff does not possess such a right, under the Constitution or the common law.[19] Whether

[19] Common law protection of trade secrets, of course, may be modified by Congress. It may well be argued, as defendant and amicus curiae, the Pesticide Formulators Association, argue herein, that information, research, and test data which is not patentable simply is not protectable under the Constitution. Article I, Section 8, clause 8 of the United States Constitution empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries." Pursuant to this constitutional authority, Congress enacted in 1790 the first federal patent and copyright law, 1 Stat. 109, and ever since that time has fixed the conditions upon which patents and copyrights shall be granted.

Patents are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from use of this invention. Sears Roebuck Co. v. Stiffel Co., 376 U.S. 225, 230 (1964). During that time, no one may make, use, or sell the patented product without the patentee's authority. 35 U.S.C. § 271. When the time covered by the patent expires, however, the right to exclusive use of the patented product passes to the public. Id.; Kellogg Co. v. National Biscuit

or not plaintiff possesses a right to exclusive use of its property within the bundle of rights which make up property ownership, this Court finds that the interference of § 3(c)(1)(D) with that alleged "right" does not rise to the level of a taking of plaintiff's property. This Court simply cannot reasonably conclude that the Administrator's mere consideration of data which is required by and which he already possesses pursuant to a lawful regulatory scheme in order to determine the registrability of a pesticide product—that is, to assure its efficacy and safety prior to its transportation in interstate commerce—without disclosing the contents of that data to any other person and without diminishing in any manner the originator's use of its own data violates the Fifth Amendment to the United States Constitution.[20]

Co., 305 U.S. 111, 120-122 (1938). An unpatented article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. Sears Roebuck Co. v. Stiffel Co., *supra*, 376 U.S. at 231. Sharing in the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all—and in the free exchange of which the consuming public is deeply interested. Kellogg Co. v. National Biscuit Co., *supra*, 305 U.S. at 122.

Because our founding fathers felt it necessary to insert into the Constitution a specific provision for obtaining a limited exclusive use of property, a persuasive argument may be made that no such general right exists. It has long been held, for example, that the holder of a patent has no exclusive right of property in his invention except under and by virtue of the statutes securing it to him, and according to the regulations and restrictions of those statutes. Dable Grain Shovel Co. v. Flint, 137 U.S. 41, 43 (1890).

[20] § 3(c)(1)(D) does not, of course, require disclosure of any of plaintiff's data to any other parties. Moreover, the United States Supreme Court has held that a producer's interest in the secrecy of its proprietary information, even including its secret formula, is subject to the right of the state to exercise its police power and to promote fair dealing. Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431 (1918); Nat'l. Fertilizer Ass'n. v. Bradley, 301 U.S. 178, 182 (1936). In oral argument, plaintiff's counsel conceded

The statutory scheme established in § 3(c)(1)(D) appears both reasonable and equitable. Although, as government counsel candidly commented in oral argument, the 1970 date may have been selected by Congress because it "has the virtue of being a round number," [21] it does represent a reasonable compromise between competing interests in the pesticide field. It requires that reasonable compensation be paid to those who originate data submitted on or after January 1, 1970, in order to spread the burden of that cost throughout the industry, and provides producers the privilege of preventing consideration of their "trade secret" data submitted after the 1970 cutoff date. Thus, at the time of its passage, the statute granted producers a period of five years' protection for "new data"; that period of protection, of course, continues to increase with the passage of time from January 1, 1970. At the same time, the statute recognizes the lesser need for protection of "old data" as well as the benefit in cost-saving to the consumer from non-protection of data submitted prior to 1970. As defendant has pointed out, the logical result of a "no limits" protection of plaintiff's data would be increased prices for consumers and claims that registrations long-since issued now are invalid, thereby subjecting the registrations of those products to termination and causing withdrawal from the marketplace of useful and needed pesticide products despite the fact that they were properly registered under the provisions of FIFRA prior to 1972. Clearly, restraining the operation of § 3(c)(1)(D) in the manner urged by plaintiff would work injury on others in greater measure than the injury allegedly worked on plaintiff by its operation. In addition, granting plaintiff the

---

that plaintiff's "right" to maintain its property exclusively is not absolute when he stated that "clearly there are circumstances under which something might have to be divulged, and I refer to proceedings in court and the like." Transcript, p. 29.

[21] Transcript, at 54.

right to compensation for all data regardless of submission, would create a "windfall" for plaintiff.[22]

Nor is § 3(c)(1)(D) invalid because it permits the Administrator to consider plaintiff's pre-1970 data in support of others' applications for registration and thereby "benefits" others without compensation to plaintiff. The objective of the statute clearly is not private gain. The statute reasonably serves a legitimate public purpose, and it is well-settled that incidental benefits to third parties in the course of obtaining that primary objective in the public interest is not impermissible. Joslin Mfg. Co. v. Providence,

---

[22] As explained above, plaintiff has no *right* to compensation for that data. Neither, under the most credible view of the facts, did plaintiff have an expectation of compensation for its pre-1970 data. Under FIFRA prior to 1972, the Administrator of the EPA was not prohibited from considering one firm's data to support another firm's application, and did so routinely. See 7 U.S.C. § 135b(a) (1970); Amchem Products, Inc. v. GAP Corp., 391 F. Supp. 124, 128 (N.D.Ga. 1975). Contrary to plaintiff's assertions, the fact that the then-effective Department of Agriculture regulations, 7 C.F.R. § 1.4(b) (Jan. 1, 1967), made the data "administratively confidential" and "not subject to examination *except in the performance of official duties*" did not prohibit the practice, or create a reasonable expectation on plaintiff's part. It must be remembered that *confidentiality* is in no way related to the issue presented herein; rather, the issue involves precisely the Administrator's consideration of data in the performance of his official duties.

Further, despite plaintiff's contention that it had no knowledge of the practice, the practice was widely-enough known in the industry for the National Agricultural Chemical Association to have taken a position in Congress in opposition to it in 1972: "Under the present law registration information submitted to the Administrator has not routinely been made available for public inspection. *Such information has, however, as a matter of practice but without statutory authority, been considered by the Administrator to support the registration of the same or a similar product by another registrant . . . .*" [Emphasis supplied.] "Statement Relative to Exclusive Use of Data Provision of H.R. 10729," contained in Report of Senate Agriculture and Forestry Committee, S.Rep. 92-838, Part 2, at 18-19 (July 1972).

262 U.S. 668, 674 (1922); Hendersonville Light & P. Co. v. Blue Ridge Interurban R. Co., 243 U.S. 563, 570 (1916); United States v. Chandler-Dunbar W. Power Co., 229 U.S. 53, 74 (1912); Kaukauna Water-Power Co. v. Green Bay & M. Canal Co., 142 U.S. 254 (1891); see Berman v. Parker, *supra,* 348 U.S. at 33. See generally 26 Am. Jur. 2d Eminent Domain Secs. 32, 35 (1966); 29A C.J.S. Eminent Domain § 31(c) (1965); Anno., 53 A.L.R. 9, 12 (1928).

II. Conclusion

In conclusion, this Court finds that § 3(c)(1)(D) of FIFRA as amended in 1975 does not divest plaintiff of a constitutional right in violation of the Fifth Amendment to the United States Constitution. Rather, the statute grants plaintiff rights which prior to FIFRA of 1972 it did not possess.

For all the foregoing reasons, it is hereby

Ordered that plaintiff's request for injunction of the operation of § 3(c)(1)(D) of FIFRA, as amended, 7 U.S.C. § 136a(c)(1)(D) (1975), be, and it is hereby, denied.

/s/ Floyd R. Gibson
Chief Judge, United States Court of Appeals for the Eighth Circuit

/s/ William H. Becker
Senior United States District Judge

/s/ Elmo B. Hunter
United States District Judge

APPENDIX B

Judgment of the United States District Court for the Western District of Missouri, Western Division, Entered March 28, 1978

APPENDIX B

Judgment of the United States District Court for the Western District of Missouri, Western Division, Entered March 28, 1978

(Caption Omitted in Printing)

(Filed March 28, 1978)

Judgment

This action came on for trial before the Court, Honorable Elmo B. Hunter, Chief Judge Floyd R. Gibson and Sr. Judge William H. Becker, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff's request for injunction of the operation of § 3(c)(1)(D) of FIFRA, as amended, 7 U.S.C. § 136a(c)(1)(D) (1975), be, and it is hereby, denied.

Dated at Kansas City, Missouri, this 28th day of March, 1978.

/s/ Thomas S. DeLuccie
Clerk of Court

APPENDIX C

Notice of Appeal to the Supreme Court of the United States.

Filed May 26, 1978

APPENDIX C

Notice of Appeal to the Supreme Court of the United States.

Filed May 26, 1978

(Caption Omitted in Printing)

(Filed May 26, 1978)

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Mobay Chemical Corporation, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the judgment of the Three Judge District Court entered in this action on March 28, 1978.

This appeal is taken under 28 U.S.C. §§ 1253 and 2282.

Lathrop, Koontz, Righter,
Clagett, Parker & Norquist

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.

/s/ C. David Barrier
C. David Barrier

/s/ Stephen W. Jacobson
Stephen W. Jacobson

1500 TenMain Center
Kansas City, Missouri 64105
(816) 842-0820

Attorneys for Mobay Chemical Corporation

APPENDIX D

Order of the Supreme Court of the United States Extending Time for Docketing This Appeal, Entered July 10, 1978

APPENDIX D

Order of the Supreme Court of the United States Extending Time for Docketing This Appeal, Entered July 10, 1978

SUPREME COURT OF THE UNITED STATES

No. A-30

MOBAY CHEMICAL CORPORATION, Appellant,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Order

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including August 24, 1978.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 10th day of July, 1978.